

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-S No.255-SB of 2006
Date of Decision-11.11.2017

Mukhtiar Singh ... Appellant
Versus
State of Punjab ... Respondent

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Ms. Poonam Josan, Advocate for the appellant.
Mr. C.L. Pawar, Sr. DAG, Punjab.

RAJ MOHAN SINGH, J.

[1]. This appeal has been preferred by appellant-Mukhtiar Singh against the judgment of conviction and order of sentence dated 17.09.2005 vide which he was convicted under Section 15 of the N.D.P.S Act and was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1,00,000/- along with default mechanism i.e. in the event of default of payment of fine, he was to further undergo rigorous imprisonment for a period of one year.

[2]. Prosecution story was to the effect that on 08.12.2002, S.I. Chaghar Singh along with police officials was going towards village Mohanpura on patrol duty in a private jeep. When the police party reached in the village Mohanpura, then a secret information was received by the Sub Inspector Chaghar Singh that the accused was involved in selling poppy husk on a bridge

of canal in the area of village Dhotian. Bhagwant Singh was joined as independent witness in the police party and thereafter, raid was conducted at the disclosed place. On seeing the police party, the accused who was sitting on the gunny bags, tried to fled away. S.I. Chaghar Singh apprehended the accused on suspicion. Thereafter, he apprised the accused about his right to be searched before the Magistrate or the Gazetted Officer. The accused opted his search to be conducted in the presence of Gazetted Officer. Non-consent memo Ex.PA was prepared which was thumb marked by the accused and was attested by PW Bhagwant Singh and ASI Subhash Chander. Thereafter, S.I. Chaghar Singh sent a wireless message to DSP Jaswinder Singh who arrived at the spot and after verifying the facts of the case, DSP Jaswinder Singh also apprised the accused in respect of his right to be searched before him or before the Magistrate. The accused reposed confidence in DSP Jaswinder Singh and consent memo Ex.PB was prepared which was thumb marked by the accused and attested by DSP Jaswinder Singh, ASI Subhash Chander and PW Bhagwant Singh. Thereafter, on the directions of DSP Jaswinder Singh, SI Chaghar Singh (Investigating Officer) conducted the search of two gunny bags on which the accused was sitting. The search ultimately led to recovery of poppy husk which on weighed found to be 35 kgs+33 kgs., 500 grams in both bags respectively. 250 grams of poppy husk was separated from each bag and was converted into two parcels. The remaining

poppy husk was put into the same gunny bags and their parcels were prepared. All the four parcels were separately sealed with seals CS and JS and all the parcels were taken into police possession vide recovery memo Ex.PC. The recovery memo was attested by PW Bhagwant Singh, SI Chaghar Singh and ASI Subhash Chander. Thereafter, ruqa Ex.PD was sent to the police station by the Investigating Officer S.I. Chaghar Singh. On the basis of said ruqa, formal FIR Ex.PD/1 was recorded by ASI Baldev Singh. Special reports were sent to the higher police officers and the Illaqa Magistrate. Thereafter, Investigating Officer prepared rough site plan Ex.PE, showing the place of recovery. Personal search of the accused was also conducted in which currency notes of Rs.570/- were recovered and memo Ex.PE was prepared. On coming back to the police station, S.I Chaghar Singh (I.O) produced the accused as well as the case property before S.I./SHO Naurang Singh who counter sealed the case property with his seal bearing impression NS. On the next day, the sealed parcels of the case property and sealed samples along with accused were produced before the Illaqa Magistrate. All the four sealed parcels were again deposited with SI/SHO Naurang Singh who kept the same in police Malkhana under double lock system. On 23.12.2002, the sealed sample parcels along with sample seal impression and docket were sent to the office of Chemical Examiner, Punjab, Chandigarh. After completion of investigation and receipt of report of Chemical

Examiner, challan against the accused was presented before the trial Court.

[3]. The accused/appellant was charge-sheeted for the offence under Section 15 of the NDPS Act for having unauthorized possession of 68.5 kgs. of poppy husk vide order dated 28.02.2033. Accused/appellant pleaded not guilty and claimed trial.

[4]. In order to prove guilt of the accused, the prosecution examined PW 1 Parminder Singh LC No.3497, Police Station Sadar, Tarn Taran. According to the testimony of aforesaid Parminder Singh, SI/SHO Naurang Singh handed over the samples to him on 23.12.2002 and he took the samples to the office of Chemical Examiner on 23.12.2002. Statement of Parminder Singh was recorded under Section 161 Cr.P.C Ex.DA, wherein he has stated that vide ravangi No.475/21 dated 23.12.2002, samples entrusted to him by SHO Naurang Singh were deposited in the office of Chemical Examiner. During cross examination, the witness pleaded ignorance to the aforesaid date whether it was 23.12.2002 or 24.12.2002. Prosecution examined SI Chaghar Singh as PW 2 who after deposing material facts in respect of prosecution story also stated that in all the samples, seals CS and JS were affixed. The seal after used was handed over to PW Bhagwant Singh by him and the seal used by DSP was retained by him. When the case property was handed over to

SI/SHO Naurang Singh, he has also counter sealed the same with his seal NS. During cross examination, the witness stated that he remained present at the spot till 6.00 PM. PW Bhagwant Singh joined the police party at the place of recovery at about 1.05 PM. The witness admitted that he had not dispatched the secret information to the superiors from the place where it was received. However, he sent his special report through wireless message to the higher officers.

[5]. Prosecution also examined Jaswinder Singh (DSP) as PW 3. ASI Baldev Singh and ASI Subhash Chander were given up being unnecessary. Naurang Singh (SHO) was examined as PW 4. The witness stated that he handed over the sealed samples along with docket to Parminder Singh LC No.3497 on 23.12.2002 for depositing the same in the office of FSL, Punjab, Chandigarh. LC Parminder Singh after depositing the sealed samples in the office of FSL on 24.12.2002 and the receipt issued by the office of FSL was handed over to him. The witness further deposed that SI Chaghar Singh has deposited 4 sealed parcels of the case property with him at about 6.30 PM, but he had not deposited the currency notes recovered from the personal search of the accused. However, he further stated that SI Chaghar Singh must have deposited the same with MHC of the police station.

[6]. After closing the prosecution evidence, statement of the accused was recorded under Section 313 Cr.P.C who had

denied all the incriminating material appearing against him and pleaded his false implication in the case. No defence evidence was led by the accused.

[7]. Trial Court on the basis of material on record, convicted and sentenced the accused/appellant in the manner as mentioned above.

[8]. I have heard learned counsel for the parties.

[9]. The case was registered on the basis of secret information. In terms of Section 42 of the NDPS Act, if the Investigating Officer has reason to believe from personal knowledge or information given by any person in respect of possession of some narcotic/contraband with the accused, then he has to take down that information in writing that any narcotic drug or psychotropic substance or control substance in respect of which an offence punishable under this Act has been committed and then in terms of Section 42(2) of the Act, after taking down the information in writing, record his grounds of belief and sent the same within 72 hours to immediate superior officer. The compliance of Section 42 of the NDPS Act has been held to be mandatory and the failure to take down information in writing and forthwith send a report to his immediate superior official, would cause material prejudice to the accused. The conflict in the mandate given by the Hon'ble Apex Court in **Abdul Rashid Ibrahim Mansuri v. State of Gujarat 2000 (2) SCC 513** and

Sajan Abraham vs. State of Kerala, (2001) 6 SCC 692 was homogeneously considered in terms of scheme of NDPS Act and its relevant provisions. Section 42 of the NDPS Act relates to power of entry, search, seizure and arrest without warrant or authorization. The Act prescribes stringent punishment, therefore, a balance has to be struck between the need of the law and the enforcement of such law on the one hand and the protection of citizens from oppression and injustice on the other hand. The provisions contained in Chapter V, intended for providing certain checks on exercise of powers of the authority concerned, are capable of being misused through arbitrary or indiscriminate exercise unless strict compliance is required. The statute mandates that prosecution must prove compliance with the said provisions. Harmonious construction between the ratios laid down by the Hon'ble Apex Court was to the effect that it was imperative that the police official should take down information in writing and forthwith send a report thereof to the immediate superior officer within 72 hours.

[10]. Since the facts involved in **Abdul Rashid Ibrahim Mansuri's case (supra)** and **Sajan Abraham' case supra** were materially different, therefore, the compliance has to be seen while taking into consideration the attending facts and circumstances of each case. The action of the police officer on the basis of unrecorded information would become suspicious, though the trial may not be vitiated on that score alone, if the

information is given to the police officer while he was moving in the vehicle and unless he acted on such information immediately, the accused would have escaped. Therefore, the facts of each case have to be appreciated while applying the requirement of Section 42 of the NDPS Act. If there was no immediate apprehension of absconding of the accused from the spot at the time of delivery of such secret information, the ratio of **Abdul Rashid Ibrahim Mansuri's case (supra)** can be applied. Equally is the proposition where there was immediate apprehension of absconding of the accused, then such recording of information and sending the same to the superiors within time prescribed would not be attracted.

[11]. In the present case, secret information was received by SI Chaghar Singh that the accused was in the habit of selling poppy husk. There was no such threat perception that in case of some delay, the accused would have gone from the spot, therefore, in my considered opinion, compliance of Section 42 of the NDPS Act can be treated to be mandatory in the present case and non-compliance thereof, would entitle the appellant the desired relief. Though, compliance of Section 50 of the NDPC Act cannot be treated to be a mandatory inasmuch as that the accused was not in conscious possession of the poppy husk as the contraband was lying in the gunny bags. Since the recovery was not from the body search of the accused, therefore, in view

of **Jarnail Singh Vs. State of Punjab, 2011 (1) RCR (Criminal)**

925, Section 50 of the NDPS Act would not be applicable.

[12]. Sealed samples were handed over to PW 1 Parminder Singh on 23.12.2002. Statement of Parminder Singh is conspicuous about his visit to the office of FSL on 23.12.2012 or 24.12.2012. The report of FSL is categoric enough to admit that the samples were received on 24.12.2002. The aforesaid material would show that the case property remained in private custody of PW 1 Parminder Singh out of Malkhana from 23.12.2002 to 24.12.2002. Testimony of PW 2 SI Chaghar Singh would show that the seals after used were handed over to PW Bhagwant Singh. PW Bhagwant Singh was not examined. In the absence of examination of independent witness, the factum of seals being handed over to independent witness would not be proved. MHC has not been examined in whose custody the contraband remained lying from the date of its recovery till the date on which the same was sent to FSL. The recovery of the contraband was effected on 08.12.2002. The statement of Investigating Officer i.e. SI Chaghar Singh (PW 2) did not show the compliance of Section 52-A of the NDPS Act as the representative samples were not drawn before the Magistrate. The samples drawn by the Investigating Officer were not sent for chemical analysis within the prescribed period as per standing instructions No.1/88 which had been issued under the Act. The instructions laid down the procedure for taking samples. The recovery was effected on

08.12.2002. The samples were sent and received in the office of FSL on 24.12.2002. The delay cannot be treated to be in consonance with the requirement of standing instructions No.1/88. The seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. Such process i.e. filing of application and taking of samples and certification cannot be left to the whims and fancies of the police officer. Such application for sampling and certification should be made without any undue delay before the Magistrate.

[13]. Nothing has been brought on record as to whether Form No.29 was not filled at the spot or was ever deposited with MHC along with the case property. Form No.29 was allegedly filled by SHO Naurang Singh, but the same was shown to have been prepared when the sealed samples were sought to be sent to the office of Chemical Examiner on 23.12.2002. Form No.M-29 was carrying seals of CS, JS and NS, but no date was shown underneath the signature of SHO Naurang Singh. However, endorsement No.1600-VRK dated 23.12.2002 was recorded.

[14]. From the aforesaid material, it cannot be inferred that Form No.29 was filled at the spot and the same deposited with MHC along with the case property. MHC of the case has not been examined, nor the alleged eye-witness Bhagwant Singh has been examined. Non-examination of Subhash Chander (ASI)

would also make the proceedings at different stages doubtful inasmuch as that documents viz. non-consent memo Ex.PA, consent memo E.x.PB and recovery memo Ex.PC were allegedly witnessed by Subhash Chander (ASI) and Bhagwant Singh (PW). In the absence of examination of those witnesses, the prosecution story would rest upon sole testimony of Chaghar Singh (IO) for proving the document Ex.PA and testimony of DSP Jaswinder Singh for proving the documents Ex.PB and PC. Bare perusal of all these documents would show that these documents were prepared at the time when FIR was in existence. FIR No.232 dated 08.12.2002 under Sections 15/61/85 of NDPS Act was duly mentioned on the head of all these documents which would show that these documents were prepared after registration of the FIR.

[15]. In the light of aforesaid, particularly in view of contradictions in the statements of PW 2 and PW 3, the case cannot be treated to have satisfied the test of proving the guilt of the accused beyond all reasonable doubts. The samples were required to be sent to the FSL within 72 hours of its recovery. The ratio of Union of India Vs. Bal Mukund and others, 2009 (2) RCR (Criminal) 574 can be relied. Even in case of **Satpal Vs. State of Haryana** i.e. **CRA-S-1449-SB of 2008**, the Court proceeded to record adverse inference against the prosecution for non-compliance of standing instructions No.1/88 dated 15.03.1988 issued by the Narcotic Control Bureau. The

cumulative effect of the aforesaid facts would show that the prosecution has not proved the case against the appellant beyond all reasonable doubts. The appellant has already undergone 5 years, 3 months and 14 days of actual sentence. Instinct of doubt has crept in the prosecution case, therefore, by giving benefit of doubt, I accept this appeal and acquit the accused/appellant from the charges levelled against him.

(RAJ MOHAN SINGH)
JUDGE

11.11.2017
Prince

Whether Reasoned/Speaking	Yes/No
Whether Reportable	Yes/No